Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1104

STATE OF MARYLAND,

Petitioner

v.

RONALD GENE WATTERS,

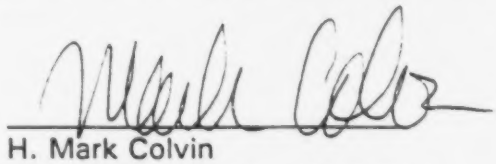
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

The Respondent, Ronald Gene Watters, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Brief in Oppositiion without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.

The Respondent's Affidavit in support of this Motion is attached hereto.



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IN THE
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Ronald Gene Watters, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that I am unable to pay the costs of said proceeding, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

NO

(a) If the answer is *yes*, state the amount of your salary or wages per month and give the name and address of your employer.

N/A

(b) If the answer is *no*, state the date of your last employment and the amount of the salary and wages per month which you received.

JUNE 1984 - J+J INSULATION CO - APPROXIMATELY $400 PER MONTH

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

ONLY MONY FROM FAMILY

(a) If the answer is *yes*, describe each source of income and state the amount received from each during the past twelve months.

APPROXIMATELY $100 FROM FAMILY

3. Do you own any cash or checking or savings accounts?

N/C

4

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

N/C

(a) If the answer is *yes*, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

LILLIAN THETHER - MOTHER

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Ronald Gene Watters

Ronald Gene Watters

Subscribed and sworn to before me, a Notary Public, this 7th day of March, 1993.

Mary F. Bryant
NOTARY PUBLIC

My Commission Expires: 2-14-1996

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

_____
JUSTICE

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QUESTION PRESENTED

Did the exclusion of the general public from the courtroom during the voir dire of prospective jurors deny Respondent his Sixth Amendment right to a public trial?

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STATEMENT OF THE CASE

At the hearing on Respondent's motion for a mistrial, defense counsel proffered as follows:

> My recollection of the -- and I would put testimony from the witness stand in the record from the sheriffs and the bailiffs if necessary -- but there was plenty of room on the left-hand side of the courtroom for spectators, members of the news media, to be present. The courtroom was not full, although certain portions of it were full where certain jury panels were seated together. (3a)

As the Court of Appeals of Maryland observed, "the prosecutor did not challenge defense counsel's recollection." (3a)

When defense counsel sought to establish how many seats were "some seats," the trial judge sustained the prosecutor's objection to further

questioning of the deputy sheriff notwithstanding as the Court of Appeals of Maryland observed "that the question represented a legitimate attempt to narrow an earlier inquiry in which the witness was asked to estimate the number of seats available - a question the witness could not answer."(3a)

At the conclusion of the hearing, the trial judge, without even making the requisite factual finding, simply deferred to the decision of the deputy sheriff, stating: "It was done as a matter of Court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial."(3a)

In holding that "under these circumstances, there was but one decision that could be made -- the defendant was entitled to the mistrial he sought", a unanimous Court of Appeals of Maryland found that the exclusion of the public, including all the members of Respondent's family, from the "somewhat protracted" jury selection process in a "highly publicized" murder case with "extensive media coverage" was of "constitutional significance" and could not, therefore, be deemed harmless error. (1a-2a)

SUMMARY OF ARGUMENTS

I. Voir dire proceedings are part of a trial for public trial purposes. Voir dire proceedings may be closed only to protect an overriding governmental interest through a narrowly tailored order. Since the record in this case establishes that there were "some seats" available throughout the voir dire proceedings and there was no compelling need for excluding members of the general public, the closure of the courtroom during the entire jury selection process violated Respondent's right to a public trial.

II. Since the exclusion of the general public, including members of Respondent's family, from the protracted jury selection process in a highly publicized murder case was of "constitutional significance," the trial judge should have granted Respondent's motion for a mistrial.

REASONS FOR DENYING THE WRIT

THE EXCLUSION OF THE GENERAL PUBLIC FROM THE COURTROOM DURING THE VOIR DIRE OF PROSPECTIVE JURORS DENIED RESPONDENT HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL.

I.

In its petition for writ of certiorari, the State of Maryland contends that the Court of Appeals of Maryland reversed Respondent's conviction "by mechanically applying the test set forth in this Court's Press-Enterprise [Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984)] and Waller [v. Georgia, 467 U.S. 39 (1984)] decisions, without thought to the distinctions between those cases and the case at bar." Petition at 6. Even a cursory review of the opinion of the Court of Appeals demonstrates that this contention is devoid of merit.

A unanimous Court of Appeals reversed Respondent's conviction because "under these circumstances, there was but one decision that could be made - the defendant was entitled to the mistrial he sought." (11a) The voir dire proceedings were a part of Respondent's trial for public trial purposes. Press-Enterprise Co., 464 U.S. at 509-10. See e.g. United States v. Sorrentino, 175 F.2d 721, 722 (3d Cir.), cert. denied, 338 U.S. 868, 70 S.Ct. 143, 94 L.Ed 532, rehearing denied, 338 U.S. 896, 70 S.Ct. 238, 94 L.Ed.

551 (1949); State v. Lawrence, 167 N.W.2d 912, 915 (Iowa 1969); State v. Pullen, 266 A.2d 222, 228 (Me. 1970) overruled on other grounds, State v. Brewer, 505 A.2d 774 (Me. 1985).[1] The voir dire proceedings should not have been closed to the public. Id. When the closure was called to the trial judge's attention, the trial judge should have determined on the record whether there was an overriding need to limit access to the courtroom to prevent overcrowding and whether the deputy sheriff had narrowly tailored the means of protecting that interest. The trial judge, however, failed to make the requisite determination. He simply deferred to the decision of a deputy sheriff. As the Court of Appeals correctly concluded:

> The circumstances at this trial did not present a compelling need for excluding members of the defendant's family as well as the press and the public. The record, although lacking in desirable particulars,[2] establishes that there were seats available during the voir dire and jury selection.
>
> Moreover, even if the State could show that under the circumstances then prevailing the government had a legitimate interest in preventing overcrowding, it could not show that the exclusion of all persons was a narrowly tailored means of protecting that interest. There was no effort to ensure that petitioner's family could be present while the jury was selected,nor was there apparently any effort to admit representatives of the press. There was not even an attempt to fill the remaining seats impartially. Rather, after the venirepersons and witnesses had taken their places, the empty seats were left vacant, notwithstanding the early arrival of the defendant's family members and their request for admission. The closure of the courtroom under these circumstances violated the defendant's

[1]Petitioner is unable to cite any authority for the proposition that the Sixth Amendment public trial right does not apply to voir dire proceedings.

[2]As previously noted, the trial judge "unfortunately" sustained the prosecution's objection when the defense counsel asked the deputy sheriff "were three or four rows of seats available in the courtroom?"(3a)

Sixth Amendment right to public trial.

II.

In its petition for writ of certiorari, the State of Maryland contends that the closure in this case was de minimus. The State then relies upon several cases that have found limited closures not violative of the Sixth Amendment. These cases are clearly inapposite.[3] The closure in this case was not de minimus; the closure was substantial. The closure carried with it a presumption of prejudice. As the Court of Appeals of Maryland observed:

> . . . The courtroom was open only to court personnel, the venirepersons, and witnesses. All other members of the public, including members of the defendant's family and the press, were barred. The closure extended over a significant period of time -- an entire morning of trial during which the voir dire and selection and swearing of the jury were accomplished.[4] Although we agree with the State that not every technical violation of the Sixth Amendment right of open trial requires a new proceeding or trial, we would be hard pressed to declare a violation of this magnitude de minimus, or otherwise not of constitutional significance.(9)

In reversing Respondent's conviction, the Court of Appeals of Maryland simply applied the Press-Enterprise test to the unique facts of this case and held, as a matter of state law, that the trial judge abused his discretion in denying Respondent's motion for a mistrial.

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[3]There is, in other words, no real conflict among the state and lower federal courts on the issue of excluding the public from voir dire proceedings.

[4]By Maryland standards, the voir dire of prospective jurors was "somewhat protracted." The proceedings lasted half a day. The public was excluded from the entire jury selection process. Given the extensive publicity surrounding this murder trial, eighty-one of a total of ninety-six venirepersons answered questions during voir dire. The voir dire proceeding were far from routine.

CONCLUSION

The petition for writ of certiorari filed by the State of Maryland should be denied, as the State of Maryland has failed to demonstrate that review of the opinion of the Court of Appeals of Maryland is necessary or desirable.

Respectfully submitted,

Stephen E. Harris
Public Defender

H. Mark Colvin*
Arthur A. DeLano, Jr.
Assistant Public Defenders

Counsel for the Respondent

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 1993, a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari were delivered to Gary E. Bair, Assistant Attorney General for the State of Maryland, 200 St. Paul Place, Baltimore, Maryland 21202.

Mark Colvin

H. Mark Colvin
Assistant Public Defender